

I3UQHUDc

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
-----x

3 HUDSON YARDS CONSTRUCTION LLC

4 Plaintiff

5 v.

18 Civ. 2376 (GHW)
Promotion Conference

6 BUILDING & CONSTRUCTION TRADES
7 COUNCIL of GREATER NEW YORK
and VICINITY, et ano.

8 Defendants

9 -----x

New York, N.Y.
March 30, 2018
3:20 p.m.

10
11 Before:

12 HON. GREGORY H. WOODS

District Judge

13 APPEARANCES

14
15 WACHTEL MISSRY LLP
16 Attorneys for Plaintiff
17 MARC LITT
EVAN WEINTRAUB

18 -and-

19 COVINGTON & BURLING LLP
20 Attorney for Plaintiff
PHILIP A. IRWIN

21
22 COLLERAN O'HARA & MILLS LLP
23 Attorneys for Defendants
CAROL O'ROURKE PENNINGTON
24 MICHAEL D. BOSSO
25

I3UQHUC

(Case called)

DEPUTY CLERK: Counsel, please state your names for the record.

MR. LITT: Mark Litt, Evan Weintraub and Philip Irwin for plaintiff, Hudson Yards Corporation.

THE COURT: Thank you. Good afternoon.

MR. LITT: Good afternoon.

MS. PENNINGTON: Good afternoon, your Honor.

Carol Pennington and Michael Bosso from Colleran O'Hara & Mills for the defendant.

THE COURT: Good. Thank you very much. Good afternoon.

I scheduled this conference to discuss principally in my view the anticipated motion to remand. I would like to focus on that. I thank counsel for your expedition in preparing premotion conference request letters with respect to that issue so that we could address it here today.

Is there anything else the parties would like to make sure we discuss during this conference? My agenda is principally to discuss the motion for remand and assume that we will proceed with it to schedule a briefing on the motion to remand. I think that that is the gating issue given that if I do not have jurisdiction, I don't have jurisdiction

MR. LITT: We would agree with that, your Honor. I would further say that I think there's a gating issue with

I3UQHUDc

1 respect to the motion, and it's partially a factual one and
2 partially a legal one, and that is the question of whether BCTC
3 is a labor organization.

4 THE COURT: That is my first question for them on the
5 303 issue.

6 MR. LITT: I think it also applies to the 301 issue
7 and I think the diversity basis is not a legitimate ground for
8 the reasons we set forth in the papers, but I just want to flag
9 the issue of potentially the need for discovery in connection
10 with that factual issue given defendant's prior representations
11 in a different case about what the nature of BCTC is.

12 THE COURT: Thank you. Understood.

13 Is there anything else that plaintiff would like to
14 make sure we discuss during this conference?

15 MR. LITT: No.

16 THE COURT: Thank you.

17 Counsel for defendant.

18 MS. PENNINGTON: Your Honor, with respect to the labor
19 organizations styles, we do have an oral argument, but also in
20 addition to what we plan to discuss, you know, based on the
21 decision on remand, we would like to discuss, you know, the
22 time to answer or move after that as well.

23 THE COURT: Thank you very much. Good. So let's
24 discuss the proposed motion.

25 Counsel, I've read your letters. Still sometimes it

I3UQHUDc

1 can be helpful for me to hear a short statement of the issues
2 that you expect to raise in the motion. As I say, I've read
3 your letters, but if there is anything that you would like to
4 say to me to either supplement or emphasize from those letters,
5 I will give you the opportunity to do so now.

6 Counsel for plaintiff.

7 MR. LITT: Just very briefly. I would say on the
8 diversity question, because defendant is from New York, they're
9 not entitled to remove based on diversity under 28 U.S.C.
10 1441(b)(2) because the defendants are from the state in which
11 we filed the action initially. And even if they were, there is
12 not complete diversity in this case given that Hudson Yards
13 Corporation is an LLC that is comprised in part by a member or
14 members from New York, and the burden is on the party that's
15 seeking to invoke federal jurisdiction to prove otherwise.

16 It's not fair or it's not the law to say that we
17 should have somehow pointed it out in our complaint because,
18 after all, we chose to file our action in state court.

19 Beyond that, you know, we view this as a business
20 dispute that relates to the tort claims that we brought. The
21 grounds on which removal are sought require that the defendants
22 be a labor organization or an agent of a labor organization.
23 We've set forth the reasons why we believe that's not the case,
24 and we make a series of alternative arguments in our papers
25 that I think are fairly straightforward where even if the Court

I3UQHUDc

1 were to find that those preemption doctrines applied where
2 given the nature of the claims that we've made, it's not
3 appropriate and remand is appropriate in this case

4 THE COURT: Thank you very much.

5 Counsel for defendants, let me hear from you. As
6 you've heard, one of the principal questions is whether BCTC is
7 a labor organization. I would like to focus on that. There is
8 also the question whether and to what extent plaintiff's claim
9 require an interpretation of the PLA with respect to the 301
10 argument. But I would like to hear whatever you can tell me
11 now about the labor organization point.

12 MS. PENNINGTON: Well, your Honor, plaintiffs cite to
13 a case that we had several years ago in another 303 case where
14 we took the position that we were not a labor organization
15 because we didn't represent employees directly. Essentially,
16 that position was rejected in that case, and there have been
17 developments over the last several years which lead us to
18 rethink that position. And also, your Honor, in this very case
19 the Project Labor Agreement defines the Building & Construction
20 Trades Council and also includes language that recognizes the
21 Building & Construction Trades Council along with its
22 affiliated local unions as the exclusive collective bargaining
23 representatives of the employees working on the Hudson Yards
24 project and covered by that PLA, so we think that that
25 provision in the PLA is --

I3UQHUDc

1 THE COURT: Thank you. Can you point me to that,
2 please?

3 MS. PENNINGTON: That is in -- I don't know what the
4 article number is, but we'll gather it for you. I believe it's
5 Article 4 of the PLA. It's usually at Article 4. Article 4,
6 page 14, which is the union recognition clause.

7 THE COURT: I have it.

8 MS. PENNINGTON: Your Honor, over the course of the
9 last several years, the Building & Construction Trades Council
10 has entered into hundreds of PLAs that includes similar
11 language; and in light of the fact that we do that regularly
12 and we process grievances that also entail some
13 employee-related matters including discipline and other things,
14 you know, whatever position we took three years ago, we have
15 revisited that position, your Honor.

16 THE COURT: Thank you.

17 MS. PENNINGTON: And I think --

18 THE COURT: Can I just ask, the Eastern District case
19 seemed to rely heavily on an NLRB decision that is many, many
20 decades old which goes to the question related to how you
21 expect to demonstrate to the Court that the entity constitutes
22 a labor organization. I'm not sure that I'm willing to accept
23 that nothing has changed since the NRB's assessment of what it
24 is that the organization does. How is it that you expect to
25 demonstrate to the Court that your client is a labor

I3UQHUDc

1 organization?

2 MS. PENNINGTON: Well, your Honor, we file all
3 reporting requirements for labor organizations, we file LM2
4 reports with the Department of Labor, and we file all reports
5 required of labor organizations. We negotiate contracts
6 regularly, including Project Labor Agreements. In fact, this
7 complaint indicates that we negotiated this PLA on behalf of
8 the affiliated unions who represent all of the employees
9 performing construction on the project covered by the PLA. So,
10 are there factual issues with respect to our status? There
11 might be. However, your Honor, I think that the complaint
12 itself reflects, and the PLA that's attached to the complaint
13 reflects, that we are indeed a labor organization.

14 THE COURT: Thank you.

15 MS. PENNINGTON: The complaint talks about how --

16 THE COURT: May I ask, has the organization
17 structuring of the BCTC changed since 1961?

18 MS. PENNINGTON: In terms of its bylaws, no, it hasn't
19 changed in terms of its bylaws, but what it does and how it
20 functions has changed significantly.

21 THE COURT: Thank you. Do delegates from the union
22 participate in the BCTC?

23 MS. PENNINGTON: Yes. We have an executive board and
24 we have a delegates meeting every month. The council is made
25 up of delegates from all of the affiliated local unions.

I3UQHUDc

1 THE COURT: Thank you. Do employees participate
2 directly in BCTC?

3 MS. PENNINGTON: Employees do not participate directly
4 in the business of the BCTC, but we have over the last several
5 years processed grievances on behalf of and with and for
6 employees that are working under Project Labor Agreements.

7 THE COURT: Thank you. Given that, what's the basis
8 for the argument that it is a labor organization?

9 MS. PENNINGTON: I'm sorry?

10 THE COURT: What's the basis for contending that it's
11 a labor organization?

12 MS. PENNINGTON: Well, I think all of those factors,
13 your Honor, establish that it's a labor organization both under
14 the National Labor Relations Act, the Labor Management
15 Relations Act, as well as the Labor Management Reporting and
16 Disclosure Act.

17 THE COURT: Thank you. So does BCTC deal directly
18 with HYC or other employers regarding grievances?

19 MS. PENNINGTON: Yes, your Honor.

20 THE COURT: Thank you. Fine.

21 So is there anything else that you would like to tell
22 me on that point, and, in particular, as the party seeking
23 removal, I think that you bear the burden of demonstrating
24 that. How is it that you expect to demonstrate the fact that
25 BCTC is or qualifies as a labor organization for purposes of

I3UQHUC

1 the 303 analysis in particular?

2 MS. PENNINGTON: Well, your Honor, in terms of the
3 pleading itself, I think the pleading itself includes facts
4 that indicate that we are. The pleading itself talks about how
5 we negotiated the PLA with Hudson Yards; that we drove the
6 issues with respect to the PLA; that we are engaged in a labor
7 dispute. The entire complaint describes a labor dispute with
8 the Council and also, your Honor, they have acknowledged in the
9 complaint that there are grievances that they have filed under
10 this PLA that they have processed with and through the Building
11 & Construction Trades Council.

12 THE COURT: Thank you. So your expectation is that in
13 briefing this, the Court will evaluate that threshold question
14 based on the facts pleaded in the complaint and the attachment
15 to the complaint.

16 MS. PENNINGTON: And the attachment to the complaint,
17 yes, your Honor.

18 THE COURT: Thank you. And the defendants don't
19 expect to put additional information before the Court in order
20 to substantiate the claim that they constitute a labor
21 organization.

22 MS. PENNINGTON: Well, your Honor, we could do that.
23 However, we're in the awkward position where we also want to
24 move to dismiss if the case remains in federal court. So, in
25 order to do that, you know, we were going to rely on the

I3UQHUDc

1 pleading so that we weren't going outside of the pleadings, but
2 if we had --

3 THE COURT: Thank you. That's fine. I understand
4 what it is that you expect to do.

5 I will just ask the parties to be mindful of who bears
6 the burden with respect to these issues at this procedural
7 stage in the case. What you choose to put in front of me in
8 connection with the application is the threshold issue that you
9 can decide.

10 Based on the proffer by defendants, however, I'd like
11 to come back to the question posed by counsel for the plaintiff
12 at the outset; namely, the extent to which discovery is
13 appropriate regarding this question. I understand that
14 defendants do not expect to put facts in front of me in
15 connection with this motion. How does that inform your
16 suggestion, counsel for plaintiff?

17 MR. LITT: Well, I don't think there are facts in the
18 complaint or in the record that defendants intend to rely on
19 that meet the definition of a labor organization when you look
20 at the strict words of the statute and what it means to be a
21 labor organization. The sine qua non is that it must be an
22 organization in which employees participate and all the other
23 things come after that. And it's not clear -- there is no
24 evidence in the record that employees participate. If the
25 Court agrees with that, we would see no need for discovery, and

I3UQHUDc

1 I think the Court could decide today that on the basis of the
2 record that they are not a labor organization.

3 THE COURT: Thank you.

4 So let's talk about the schedule for briefing this
5 motion. I'm not going to spend much time talking about the 301
6 issue. I recognize the parties' competing views about the
7 extent to which the Court's construction of the PLA is at issue
8 in this case, whether or not it is at issue or whether or not
9 it's purely described for context as asserted by plaintiffs.

10 Counsel for plaintiff, when would you propose to file
11 your motion?

12 MR. LITT: Well, I think statutorily we have 30 days
13 from the time of the notice of removal. I'm, frankly, not sure
14 if that time has been tolled by our premotion letters here
15 or -- I mean, 30 days from today if that's acceptable to -- if
16 that doesn't breach a statutory bar would be fine.

17 THE COURT: Thank you.

18 Counsel for defendants, what's your view?

19 MS. PENNINGTON: I'm sorry, sir, I couldn't hear you.

20 THE COURT: The question is what is your view
21 regarding plaintiff's proposal that their remand can be filed
22 30 days from today?

23 MS. PENNINGTON: 30 days is fine, your Honor.

24 THE COURT: Good. Thank you. So I will accept that
25 proposal, and will direct that the plaintiff's motion for

I3UQHUDc

1 remand be filed no later than April 30, which is approximately
2 a month from today. I'm tempted to make it May 1, which is
3 Labor Day in Mexico, but we will have the motion be due on
4 April 30.

5 Counsel, for defendants how much time do you think
6 that you need in order to oppose the motion?

7 MS. PENNINGTON: I think 21 days after that, your
8 Honor.

9 THE COURT: Good. Thank you.

10 Counsel for plaintiff, what's your view regarding that
11 proposal?

12 MR. LITT: That's fine. That's acceptable.

13 THE COURT: Good. Thank you.

14 So the schedule for this motion follows the moving
15 brief will be due no later than April 30. Any opposition will
16 be due no later than 21 days following service of the motion.
17 Any reply will be due no later than one week following seven
18 days following service of the opposition.

19 Now, let's talk about the deadline for the defendants
20 to answer or otherwise respond to the complaint. Counsel for
21 defendants, what's your proposal?

22 MS. PENNINGTON: We would like 20 days after the
23 decision on the motion to remand.

24 THE COURT: Thank you.

25 Counsel for plaintiff, what's your view?

I3UQHUDc

MR. LITT: That's acceptable to us.

Could I briefly be heard on the reply time given Memorial Day weekend intervenes in that week?

THE COURT: Thank you very much. I hadn't observed that.

MR. LITT: If we could have a couple more days, that would be appreciated.

THE COURT: Thank you. Give me one moment. Thank you. I see that.

Counsel for defendants, would you mind if I set a two week turnaround time for reply given the holiday?

MS. PENNINGTON: No, your Honor.

THE COURT: Thank you.

So I'm modifying the briefing schedule. The motion itself will be due on the 30th. Any opposition due three weeks after that and any reply no later than two weeks following service of the opposition. I will order that the deadline for the defendants to answer or otherwise respond to the complaint be set to the date that is 20 days following the Court's decision on the motion to remand. I will try to decide that promptly, understanding that I'll be presented with a relatively clear set of issues that the parties have already articulated relatively clearly in your letters. I hope that I can turn to this relatively promptly.

Good. Anything else for us to discuss in this

I3UQHUDc

1 conference, counsel?

2 MR. LITT: Not from plaintiff.

3 THE COURT: Good. Thank you.

4 Counsel for defendants?

5 MS. PENNINGTON: No. Thank you, your Honor.

6 THE COURT: Good. Thank you all very much.

7 This proceeding is adjourned.

8 (Adjourned)